

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE EARL THOMAS,

Defendant-Appellant.

UNPUBLISHED

May 31, 2005

No. 250915

Oakland Circuit Court

LC No. 01-180370-FC

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of assault with intent to murder, MCL 750.83. Defendant was sentenced, as a fourth habitual offender under MCL 769.12, to twenty-two to fifty years' imprisonment, with credit for 798 days served. We affirm.

On appeal, defendant first claims that the prosecutor improperly introduced evidence that defendant exercised his right to remain silent and right to counsel after being advised of his *Miranda*¹ rights and that the trial court improperly relied on this evidence to convict defendant. We disagree.

We review an unpreserved constitutional error for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To show that his substantial rights were affected, a defendant must demonstrate prejudice by showing that an error affected the outcome of the proceedings. *Id.* at 763. Reversal is required if an error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings irrespective of the defendant's innocence. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).

A defendant's decision to exercise his *Miranda* rights may not be used against him at trial. See *People v Belanger*, 454 Mich 571, 577; 563 NW2d 665 (1997). There is a fundamental unfairness in promising an arrested person that his silence cannot be used against him and, subsequently, using the silence as evidence against him at trial. *Id.*; see also *Wainwright v Greenfield*, 474 US 284, 292; 106 S Ct 634; 88 L Ed 2d 623 (1986). It is also

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

unfair to use a defendant's post-*Miranda* silence to overcome an insanity defense. *Wainwright, supra* at 292; *Belanger, supra* at 577.

Here, the prosecutor elicited information from a detective that defendant invoked his right to remain silent and right to counsel after being advised of his *Miranda* rights. The prosecutor contended during closing arguments that defendant knew the difference between right and wrong when he requested an attorney after his arrest. In light of the case law cited above, we conclude that it was improper for the prosecutor to question and comment on defendant's exercise of his rights to remain silent and to counsel.

Although the prosecutor erred by addressing defendant's exercise of his *Miranda* rights, we further conclude that the error was harmless, given the circumstances of this case. There was no evidence suggesting that the trial court based its ruling on improperly admitted evidence. In an exhaustive list of factual findings, the trial court mentioned that defendant elected not to make a statement to the detective after his arrest. However, the trial court's conclusion that defendant was not legally insane was based on defendant's conduct, not on the exercise of his *Miranda* rights. The trial court found that defendant got rid of the handle of the knife used in the stabbing, left the scene of the stabbing, and knew his conduct would send him to prison. The trial court concluded that defendant's conduct was "anti-social, goal-directed and conscious" and "not the result of any mental illness." The trial court did not identify defendant's silence as a reason for rejecting his insanity defense.

Moreover, we note that defense counsel questioned the detective on cross-examination regarding defendant's exercise of his *Miranda* rights by inquiring whether the detective asked defendant any additional questions. Defense counsel also questioned the defense expert regarding whether defendant's exercise of his constitutional rights affected the expert's opinion of defendant's mental status at the time of the crime.

Furthermore, the prosecutor's erroneous questions and comment did not affect the trial outcome because there was substantial evidence to support the trial court's conclusion that defendant was not legally insane. There was evidence from the prosecution expert, Dr. Clark, that defendant was able to conform his behavior to the requirements of the law at the time of the stabbing. A defense expert, Dr. Daigle, indicated some uncertainty regarding whether defendant possessed the ability to control his conduct and prevent the stabbing. There was evidence that defendant was malingering, or purposefully imitating symptoms of insanity. There was also evidence that defendant reported in previous records that he had good mental health. There was a noticeable absence of evidence of prior mental illness, although defendant had eight prior referrals for evaluation to the State Forensic Center. Given that (1) the issue of defendant's silence has not been preserved for appeal because of defendant's failure to object, (2) defendant elicited the same testimony from other witnesses, and (3) this was a bench trial and the trial court did not identify the evidence as relevant to its conclusion of whether defendant was legally insane, we hold that the error was harmless and does not require reversal.

Because we conclude that the prosecutor's questioning and remark were not outcome-determinative, we also conclude that defense counsel's failure to object to the erroneous questions and comment was likewise not outcome-determinative; counsel's inaction did not deprive defendant of the effective assistance of counsel. Even if we were to conclude that defense counsel's conduct fell below an objective standard of reasonableness, defendant would

nonetheless be unable to establish that he was denied the effective assistance of counsel. See *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

Defendant's second claim on appeal is that the trial court erred in finding that defendant was criminally responsible for his actions at the time of the offense. We disagree.

We review a challenge to the sufficiency of the evidence in a bench trial de novo and in the light most favorable to the prosecutor to resolve whether the trial court could have found that the elements of the offense were proven beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). In determining whether a trial court's verdict is inconsistent with the evidence presented, we must give deference to the trial court's findings when they are based on a witness' credibility. *Id.* at 267. Generally, if there exists no factual inconsistency in the court's findings, we will refuse to reverse a conviction if the defendant was clearly found guilty beyond a reasonable doubt. *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998).

"[T]he insanity defense as established by the Legislature is the sole standard for determining criminal responsibility as it relates to mental illness or retardation." *People v Carpenter*, 464 Mich 223, 239; 627 NW2d 276 (2001).

Legal insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." *Id.* at 230-231, quoting MCL 768.21a(1).

Under MCL 768.21a(3), the defendant bears the burden of proving the insanity defense by a preponderance of the evidence. *Id.* at 231.

At trial, both parties presented experts who testified about defendant's mental status at the time of the offense. Although Dr. Daigle opined that defendant was not criminally responsible for his behavior at the time of the stabbing due to his atypical psychotic disorder, Dr. Clark opined that defendant was criminally responsible for his conduct at the time of the stabbing because defendant was able to control himself and conform his actions to the law. There was testimony that defendant was malingering and that, despite eight prior evaluations, defendant was never found to have a documented mental illness. There was evidence that defendant retrieved a knife; motioned his supervisor to be silent as he entered a truck where he stabbed the victim, Keith Lockhart; left the scene of the stabbing; got rid of the knife handle; and acknowledged he would be in trouble with authorities for his conduct. We conclude that, viewing the evidence in the light most favorable to the prosecutor, a rational factfinder could have determined that defendant was not legally insane at the time of the offense.

Defendant's third claim on appeal is that the prosecutor misstated the law by suggesting to the trial court that it not consider the lesser offense of assault with intent to do great bodily harm and that the trial court therefore improperly failed to contemplate this necessarily included lesser offense in determining its verdict. We disagree.

Because defendant failed to object to the prosecutor's comment forming the basis of the alleged misconduct, we review this claim for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). As noted, to demonstrate that his substantial rights were affected, a defendant must establish that prejudice occurred by showing that the error affected the outcome of the proceedings below. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or substantially impaired the fairness, integrity, or reputation of the proceedings regardless of the defendant's innocence. *Ackerman*, *supra* at 448-449.

Here, the prosecutor indicated during his rebuttal argument that, under *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), the trial court should not consider the lesser offense of assault with intent to do great bodily harm in determining the verdict. Defendant was charged and convicted of assault with intent to murder. The elements of assault with intent to murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). A factfinder must find an actual intent to kill in order to find a defendant guilty of assault with intent to murder. *People v Brown*, 196 Mich App 153, 159; 492 NW2d 770 (1992). The elements of assault with intent to do great bodily harm less than murder are "(1) an attempt or offer with force or violence to do corporeal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder." *Lugo*, *supra* at 710.

The characterization of a lesser offense determines whether a factfinder may consider that offense in determining the verdict. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). A necessarily included lesser offense is an offense that includes all elements of the greater offense; thus, it would be impossible to perpetrate the greater offense without first having committed the lesser offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). A cognate lesser offense shares some of the same elements and is of the same class as the greater offense but contains some elements distinct from the greater offense. *Id.* Before *Cornell*, *supra*, a trial court was required, upon request, to instruct the jury with regard to a cognate lesser offense if there was sufficient evidence to support a conviction of the lesser offense. *People v Burns (On Remand)*, 250 Mich App 436, 441; 647 NW2d 515 (2002). However, in *Cornell*, *supra* at 353-359, the Michigan Supreme Court interpreted MCL 768.32 as providing that instructions on cognate lesser offenses are impermissible because they do not provide a defendant with adequate notice that he might be convicted of the lesser offense. The Court held that a necessarily included lesser offense is properly considered "if the charged offense requires the [factfinder] to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357.

However, the instant case was tried before *People v Mendoza*, 468 Mich 527, 540-541; 664 NW2d 685 (2003), in which the Michigan Supreme Court held that a diminished *mens rea* could potentially be included in a greater *mens rea* for purposes of determining if a lesser offense is a necessarily included lesser offense. Therefore, the prevailing law at the time of trial was ambiguous regarding the specific determination of whether assault with intent to commit great bodily harm was a necessarily included offense of assault with intent to murder.

Regardless whether the prosecutor misstated the then-existing law, we conclude that there was no evidence that the prosecutor's statement was outcome-determinative. The facts do not support an assumption that the trial court relied on the prosecutor's statement to determine the

verdict. The trial court did not mention assault with intent to do great bodily harm in its findings or conclusions. Rather, the trial court listed the elements of assault with intent to murder and concluded that the prosecutor proved these elements beyond a reasonable doubt. We conclude that there was ample evidence to support the trial court's finding that defendant assaulted Lockhart with the intent to kill. There was evidence that defendant concealed a six-inch knife, approached and stabbed Lockhart in the left chest area, broke off the knife handle, and attempted to get rid of the handle. Given that the trial court explicitly found an intent to kill and that there was sufficient evidence to support that finding, we conclude that the prosecutor's statement did not affect the trial outcome. Because defendant failed to show that the prosecutor's statement was outcome-determinative, we also conclude that defendant failed to demonstrate that he received ineffective assistance of counsel when defense counsel failed to object to the prosecutor's statement. See *Rice (On Remand)*, *supra* at 444-445.

Defendant's fourth claim on appeal is that he was denied his constitutional right of confrontation when the trial court admitted hearsay statements by anonymous prison inmates. We disagree.

Because defendant failed to object to the introduction of the allegedly inadmissible evidence below, we once again review this claim for plain error affecting defendant's substantial rights. A trial court's determination on a close evidentiary question rarely constitutes plain error. See *People v Gonzalez*, 256 Mich App 212, 217; 663 NW2d 499 (2003).

Hearsay is defined as "'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003), quoting MRE 801(c). Hearsay is inadmissible unless otherwise made admissible by the rules of evidence. *McLaughlin*, *supra* at 651.

Under MRE 705, an expert may be required to disclose, on cross-examination, the facts underlying his opinion. An expert witness may base his opinion regarding a defendant's criminal responsibility on hearsay or historical data, such as findings of other experts. *People v Dobben*, 440 Mich 679, 695-696; 488 NW2d 726 (1992). In general, evidence forming the basis of an expert opinion is admissible. *People v Pickens*, 446 Mich 298, 334-335; 521 NW2d 797 (1994).

Here, the prosecutor elicited information from the defense expert about certain prison reports that were part of the record on which the expert based his opinion. In particular, the prosecutor questioned the defense expert about a complaint by a prior inmate that defendant was making sexual remarks to the younger men in the cellblock and about a complaint from a deputy that defendant sent a letter asking her to marry him. During closing argument, the prosecutor noted that, although defendant's delusional thoughts consisted of alleged threats by homosexuals at the Salvation Army, prison reports indicated that defendant was the one making aggressive advances toward others.

Defense counsel also questioned the defense expert about defendant's prison reports, asking if these reports were significant in determining defendant's mental health and whether they were inconsistent with defendant's delusional beliefs concerning homosexuals at the

Salvation Army. The defense expert responded that the reports indicated that defendant's thought processes were disorganized and irrational.

Given that the prosecutor's questions and comment were made to establish the basis for the defense expert's opinion and that defendant's own counsel referred to the allegedly improper evidence, we conclude that the trial court's admission of former complaints by prison inmates and personnel was not improper. Even if the evidence was erroneously admitted, defendant failed to show that the prosecutor's conduct was outcome-determinative. There was substantial evidence to support the trial court's verdict. Therefore, we hold that the admission of evidence concerning defendant's prison reports did not constitute plain error affecting defendant's substantial rights. Because defendant failed to demonstrate that the admission of evidence from the prison reports was prejudicial, we conclude that he failed to show that he was denied the effective assistance of counsel due to counsel's failure to object to the introduction of this evidence. See *Rice (On Remand)*, *supra* at 444-445.

Defendant's fifth claim on appeal is that he was denied his constitutional right to a speedy trial. We disagree.

Because the record lacks evidence that defendant demanded a speedy trial or moved for dismissal on speedy trial grounds, we review this unpreserved constitutional issue for plain error affecting defendant's substantial rights.² *Carines*, *supra* at 763-764. As noted previously, to show that his substantial rights were affected, a defendant must demonstrate that an error affected the outcome of the proceedings. *Id.* at 763. The defendant must show that there was

² Although defendant claims he asserted his right to a speedy trial by moving for dismissal, we find that there is no such motion in the lower court file as presented to this Court. It appears that defendant mistakenly equates his argument at sentencing, that he never waived the 180-day rule, with an argument to dismiss the case on speedy trial grounds. MCL 780.131(1) requires the prosecutor to make a good faith effort to bring a criminal to trial within 180 days of the time the prosecutor knows that person is incarcerated in a state prison or is detained awaiting incarceration in a state prison. See also MCR 6.004(D)(1). The purpose of the 180-day rule is to "dispose of untried charges against prison inmates so that sentences may run concurrently." *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999), quoting *People v Bell*, 209 Mich App 273, 279; 530 NW2d 167 (1995). "[T]he statute applies only to those defendants who, at the time of trial, are currently serving in one of our state penal institutions, and not to individuals awaiting trial in a county jail." *McLaughlin*, *supra* 643. In the instant case, there is no evidence in the record that defendant was incarcerated in a state prison. Rather, the record indicates that defendant was released from prison in October 1999 and committed the instant offense in March 2001. The record also indicates that defendant could not meet his bond and was incarcerated in the Forensic Center and the Oakland County Jail pending trial on the instant charge. The trial court did not find persuasive defendant's argument about the 180-day rule. Moreover, defendant waived the applicability of the 180-day rule and assented to further trial delay in a handwritten document filed with defense counsel's request for reevaluation of defendant's criminal responsibility. Therefore, we conclude that defendant was not entitled to the protections afforded by the 180-day rule. We further conclude that, to the extent that defendant mistakenly conflates the 180-day rule and his right to a speedy trial for purposes of preservation, defendant failed to assert his right to a speedy trial below.

prejudice due to the conviction of an innocent defendant or because the error seriously affected the fairness, integrity, or public reputation of the proceedings regardless of the defendant's innocence. *McNally*, *supra* at 5.

A criminal defendant has a right to a speedy trial under both the United States and the Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Hickman*, 470 Mich 602, 607 n 3, 608; 684 NW2d 267 (2004). To determine if a pretrial delay violated a defendant's right to a speedy trial, Michigan Courts have adopted the four-part balancing test as set forth in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972). *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). "The test requires a court to consider '(1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.'" *Id.*, quoting *People v Williams*, 163 Mich App 744, 755; 415 NW2d 301 (1987).

Here, the length of the delay was just over twenty-four months. A delay of eighteen months or more is presumptively prejudicial to the defendant, and it shifts the burden of proof to rebut the presumption of prejudice to the prosecution. *Cain*, *supra* at 112. Because this case includes a delay of more than eighteen months, the prosecution bears the burden of rebutting the presumption of prejudice. Moreover, a presumption of prejudice triggers a review of the other factors to be balanced to determine if a defendant was denied his right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997); *People v Rosengren*, 159 Mich App 492, 504; 407 NW2d 391 (1987).

The second factor requires consideration of the reasons for the delay. In assessing the reasons for the delay, this Court must examine and attribute each period of delay to either the prosecution or the defendant. *Gilmore*, *supra* at 460-461. Although delays inherent in the court system are attributable to the prosecutor, they are given minimal weight in a speedy trial analysis. *Id.* at 460. Here, defendant directly contributed to at least ten months of the trial delay by requesting an independent psychiatric evaluation, additional psychological records, and reevaluation of defendant based on newly obtained institutional records. The remaining fourteen months of delay are attributable to either the time that defendant was declared to be incompetent to stand trial or attributable to the prosecutor. The prosecutor requested an independent psychiatric evaluation that delayed the trial for approximately three months. Moreover, court scheduling and a witness' failure to attend a hearing also contributed to the trial delay.

The third prong of the test requires a court to determine whether a defendant asserted his right to a speedy trial. The defendant's failure to invoke his right to a speedy trial weighs against his later claim that he was denied the right. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993); *People v Sickles*, 162 Mich App 344, 356; 412 NW2d 734 (1987). Here, the record contains no evidence that defendant asserted his right to a speedy trial or moved to dismiss on speedy trial grounds.

Prejudice is the fourth factor to consider in determining if a defendant was denied his right to a speedy trial. Michigan courts recognize two forms of prejudice: "prejudice to the person and prejudice to the defense." *Gilmore*, *supra* at 461-462. Prejudice to the person consists of the deprivation of a defendant's civil liberties, and prejudice to the defense consists of harm to a defense resulting from the delay. *Id.* at 462.

Although defendant was incarcerated during the twenty-four months of delay, we hold that defendant was responsible for at least ten months of the delay and assented to other portions of the delay. Moreover, his defense was not harmed by the delay. Defendant fails to demonstrate, or even suggest, that his defense was harmed by the loss of any potential witnesses favorable to his case, any memory of the events, or any other exculpatory evidence due to the delay. Therefore, defendant's claim of prejudice lacks merit. After balancing the four factors, we conclude that the prosecution has overcome the presumption of prejudice because at least ten of the twenty-four months of the trial delay were attributable to defendant, the prosecutor did not act in bad faith in requesting an independent psychiatric evaluation of defendant, defendant failed to assert his right to a speedy trial, and defendant suffered no prejudice to his defense as a result of the delay. Accordingly, we hold that defendant was not denied his right to a speedy trial.

Defendant's sixth claim on appeal is that the prosecutor failed to file, in a timely manner, notice of the intent to seek enhancement of defendant's sentence based on his status as a fourth-offense habitual offender and that the trial court erred by permitting the prosecutor to substitute another prior felony for a disputed felony listed on the notice. We disagree.

Because this issue involves the interpretation of the sentencing-enhancement statutes, we review this issue de novo. See *People v Hornsby*, 251 Mich App 462, 469; 650 NW2d 700 (2002).

Under MCL 769.12, defendant's sentencing guidelines score was enhanced because he was classified as a fourth-offense habitual offender. A prosecutor must provide notice to a defendant within a strict time frame of twenty-one days after arraignment of the intent to pursue enhancement as a habitual offender if the defendant is convicted of the charged offense. MCL 769.13(1); *People v Morales*, 240 Mich App 571, 586; 618 NW2d 10 (2000).

MCL 769.13(2) provides, in relevant part:

The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). *The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court. [Emphasis added.]*

At the arraignment hearing, defense counsel acknowledged receipt of the prosecutor's notice of intent to seek sentence enhancement. On the following day, the prosecutor filed the notice of intent to seek sentence enhancement for a fourth or subsequent offense with the circuit court. The applicable statute allows for notice to be served on the defendant or his attorney. Because the prosecutor properly filed notice with the court and with defense counsel pursuant to the statutory requirement, we conclude that defendant was provided with notice of the possibility of an enhanced sentence as a fourth habitual offender.

A notice of intent to seek an enhanced sentence must list the prior convictions that will form the basis of the sentence enhancement. MCL 769.13(2). After the expiration of twenty-one

days, the prosecutor may not amend the notice to allege additional prior convictions but may amend the information in such a way that does not materially change a defendant's potential consequences. *Hornsby*, *supra* at 470-473; see also *People v Ellis*, 224 Mich App 752, 755-757; 569 NW2d 917 (1997).

Defendant contended at sentencing that he was never convicted of escape from jail in 1987. However, defendant failed to offer any evidence of the inaccuracy. Although defendant's presentence investigation report (PSIR) provided presumptive proof of defendant's prior escape conviction, see *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998), and MCL 769.13(5)(c), the trial court replaced defendant's 1987 conviction for escape with defendant's 1996 conviction for assault with a dangerous weapon for purposes of the habitual fourth. The assault conviction was listed on defendant's PSIR, and defendant admitted to the assault conviction. Defendant failed to object to this substitution. On the contrary, defense counsel specified that he had no objections and was "satisfied" with the amended notice. An amendment to the habitual offender notice that does not alter the potential consequences to the offender does not defeat the purpose of the notice requirement, which is to provide a defendant with pretrial notice of the potential consequences of a conviction of the charged offense. *Hornsby*, *supra* at 471-472. Accordingly, we conclude that defendant's enhanced sentence was proper because the trial court did not err by substituting another prior felony that did not alter defendant's potential consequences.

Furthermore, we refuse to grant defendant's request to remove his 1987 escape conviction from his PSIR because defendant failed to provide additional evidence of inaccuracy with regard to this conviction and because the record contains no evidence that the trial court found the information about the escape conviction to be inaccurate.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood